No. 79-261

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEROY BARNES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1979. A petition for rehearing was denied on June 18, 1979 (Pet. App. 101a-105a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 17, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper for the district court to consider petitioners' refusal to cooperate with the government as one factor in imposing sentence.

2. Whether petitioners were denied their Sixth Amendment right to an impartial jury by the district court's refusal during voir dire to require disclosure of prospective jurors' names and addresses and to inquire into their ethnic and religious backgrounds.

3. Whether the district court abused its discretion in dealing with a claim of juror misconduct.

4. Whether the district court properly refused to conduct a hearing into the manner in which the government obtained the tax returns of certain defendants.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to possess and distribute heroin and cocaine, in violation of 21 U.S.C. 846. Petitioner Barnes was convicted on one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, and on one count of possessing and distributing heroin, in violation of 21 U.S.C. 841(a)(1). Also convicted on substantive charges of possession and distribution of heroin in violation of 21 U.S.C. 841(a)(1) were petitioners Fisher (three counts), Baker (two counts), McCoy (two counts), Monsanto, Hatcher, Hines, Rollock and Centeno. In addition, petitioner Johnson was convicted on two counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1), and petitioner McCoy was convicted of unlawfully carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).[1] The court of appeals affirmed, one judge dissenting (Pet. App. 1a-100a).

1. The evidence presented at trial, the sufficiency of which is not in dispute, showed that petitioner Barnes was the head of an organized syndicate that distributed massive quantities of narcotics on the

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[1] Petitioner Barnes was acquitted on three substantive narcotics counts and petitioner McCoy was acquitted on two firearms charges. In addition, co-defendants Gary Saunders and Wayne Sasso were acquitted, and the jury failed to reach a verdict as to co-defendant Guy Fisher.

Petitioner Barnes was sentenced to life imprisonment, a life term of special parole, and a fine of $125,000. Petitioner Baker was sentenced to two consecutive terms and one concurrent term of 15 years' imprisonment, to be followed by 6 years of special parole, and a fine of $20,000. Petitioners Monsanto, Hatcher and Hines were each sentenced to two consecutive terms of 15 years' imprisonment, a total of 6 years' special parole, and $20,000 in fines. Petitioner Hayden was sentenced to 15 years' imprisonment, a life term of special parole, and a fine of $25,000. Petitioner Fisher was sentenced to a term of 8 years' treatment as a youth offender under 18 U.S.C. 5010(c). Petitioner Johnson was sentenced to two consecutive terms and one concurrent term of 15 years' imprisonment, a total of 6 years' special parole, and a $10,000 fine. Petitioner Rollock was sentenced to two concurrent terms of 15 years' imprisonment and three years' special parole. Petitioner McCoy was sentenced to three concurrent terms of 15 years' imprisonment, one consecutive term of five years' imprisonment, and three years' special parole. Petitioner Centeno was sentenced to treatment as a youth offender under 18 U.S.C. 5010(b).

streets of Harlem and the South Bronx, New York, from 1974 through March 1977. The organization's operations took two principal forms. On certain occasions members of the organization made wholesale "bulk sales" of narcotics in quantities of one-eighth kilogram or more and of a quality that allowed for further dilution before being sold for use by addicts (Pet. App. 7a-9a). The organization's greatest profits, however, came from high-volume "street sales" of small amounts, or "quarters," of user quality heroin (Pet. App. 9a). In order to facilitate the distribution of minimal purity narcotics, the organization obtained large quantities of cutting agents (quinine or mannite) necessary to dilute the heroin (Pet. App. 6a, 8a-10a). As part of the organization's efforts to conceal its operations, various members participated in "washing" the proceeds of the drug sales, *i.e.*, exchanging large quantities of small bills received from street sales for large denomination bills that could not be traced back to narcotics transactions (Pet. App. 7a). The organization reaped millions of dollars in profits from its narcotics operations (Pet. App. 38a-39a).[2]

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[2] For example, the tax returns of petitioners Barnes, Hayden and Hines and co-defendants Guy Fisher and Wayne Sasso—all prepared by the same Detroit law firm—showed reported "miscellaneous" income totalling collectively over $1,380,000 for the years 1974-1976 (Pet. App. 39a). The extraordinary scope and profitability of Barnes' narcotics operations were also evidenced by the lavish lifestyle of the co-conspirators. Barnes himself was the owner or operator of five Mercedes Benzes, a Cadillac, a Corvette and a Citroen Maserati. Another co-conspirator, Steven Monsanto, was the

2. The Barnes organization was dangerous as well as enormously profitable. Prior to trial, the government informed the trial judge that it had received a threatening communication directed against one of its major witnesses (Pet. App. 17a). The Court was also informed that several of the defendants, including petitioners Barnes and Hayden, had attempted to kill one of their organization's heroin distributors because of a dispute over money (Govt. Br. 67-68 & n.*). In fact, one potential government witness, Shepard Franklin, was murdered on the eve of trial at a garage where many of the Barnes organization's narcotics transactions took place (Pet. App. 18a n.7). Finally, in its motion papers seeking sequestration of the jury, the government informed the district court of three recent cases, each involving similar narcotics conspiracy charges brought in the Southern District of New York, in which there had been instances of jury tampering (Pet. App. 12a-13a n.3).

Because of the large scale of the narcotics distribution network and because of petitioner Barnes' alleged role as one of the major narcotics distributors in New York, this case generated a large amount of pretrial publicity (Pet. App. 26a). An article about petitioner Barnes and his forthcoming trial was the cover story for the Sunday N.Y. Times, June 5, 1977 (Magazine). That article featured a full, front-page

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driver of no fewer than 17 automobiles, including five Mercedes Benzes and two Cadillacs (Pet. App. 39a; Govt. Br. 9-10). ("Govt. Br." refers to the brief filed by the government in the court of appeals.)

color photograph of Barnes and described him variously as "Mr. Untouchable," a man who had become the most prominent heroin dealer in the entire New York area, and a man who had been indicted and acquitted on four prior state charges, including murder. Furthermore, much of the pretrial publicity emphasized the many alleged acts of violence of several of the defendants (Pet. App. 26a).

3. These facts created substantial problems for the district court in connection with the selection of the jury. The procedures followed by the district court are summarized in the opinion of the court of appeals (Pet. App. 11a-18a, 85a-87a). Prior to trial, the district court disclosed to counsel for the government and the defense that in order to shelter the jurors and their families from media inquiries and publicity, the names and addresses of the jurors would not be divulged to either side. In addition, the court stated that it would not comply with defense requests to question the jurors concerning their neighborhoods of residence or their religious and ethnic backgrounds (Pet. App. 85a-86a).[3]

The process of jury selection took nearly four days to complete (Pet. App. 87a). Each of the 150 prospective jurors was assigned a number, and the court then addressed several questions to the entire panel (Pet.

[3] The court also granted the government's request to sequester the jury; petitioners do not challenge that decision (Pet. App. 86a & n.2).

App. 13a-14a).[4] After numerous prospective jurors were excused for cause, the court questioned each juror individually concerning his or her occupation (and the occupations of family members), county of residence, family status, health problems, educational background, and membership in any organized group or association (Pet. App. 14a-15a). The prospective jurors were also asked whether they or their friends or relatives had dealt with any government agency assigned to investigate narcotics offenses; had been employed by the federal government or by any government investigative agency; had previously served as jurors; had been charged with a crime; had been subpoenaed to testify in court; or had been the complainant in a criminal case (*ibid.*). In addition, the court inquired whether the prospective jurors had any opinions about courts, defense attorneys, prosecutors

[4] The government submitted 45 questions to be propounded to the panel; counsel for the defense submitted more than 100 (Pet. App. 13a). As the court of appeals correctly stated, "[t]he substance of these many requests, with the exception of ethnic background and religion, were embodied in the court's questions" (*ibid.*). These questions included whether the prospective jurors knew any of the attorneys or alleged participants involved in the case; whether they had had any contact with any individuals or businesses to which reference would be made during the trial; whether they could accept and apply the law as instructed by the court; whether they had any feelings about undercover agents, paid informants, or electronic surveillance which would prevent their fair judgment of the case; whether they, or close friends or relatives, had had any prior experiences with narcotics or with firearms which would prevent fair consideration of the case; whether they had seen or read anything that would influence their judgment; and whether they would be able to sit during a rather lengthy trial (Pet. App. 13a-14a).

or law enforcement officers that would prevent fair judgment of the case; whether they had ever been involved in a law suit with the federal government; and whether they had read, or had any previous knowledge, about this case (Pet. App. 15a).

All of the defendants except one (a Hispanic) were black (Pet. App. 12a). The district court addressed specific and comprehensive questions to the prospective jurors designed to uncover any racial prejudice (Pet. App. 15a-16a & n.4). For example, the court asked about each juror's general attitude toward blacks; whether the juror had ever moved to a different area because he had been disturbed by changing conditions; whether the juror had had any experience with persons of other races, creeds, or colors resulting in civil or criminal confrontations, or whether the juror had ever had any experiences with persons of different races arising out of employment, residence, or school situations, which might make him feel that he could not fairly judge such persons. Most prospective jurors were also asked whether they felt they were generally prejudiced against persons of other races (Pet. App. 15a-16a). In many instances, prospective jurors were excused when they admitted prejudice or a tendency to favor the government (Pet. App. 16a). Of the jurors who were selected, five were black, and one of the alternate jurors was Hispanic (Pet. App. 17a n.5).[5]

[5] The district court allowed defense counsel 20 peremptory challenges, twice the number to which they were legally entitled. Fed. R. Crim. P. 24(b). All 20 challenges were exercised (Govt. Br. 71 n.*).

4. In affirming petitioners' convictions, the court of appeals concluded that under the particular circumstances of this case, in which so much pretrial publicity had been generated, and "in which allegations of dangerous and unscrupulous conduct abounded" (Pet. App. 27a), the district court's decision to withhold the names and addresses of the jurors constituted a proper exercise of discretion under Fed. R. Crim. P. 24(a). In reaching this decision, the court cited the threat that had been received against one of the government's witnesses, the death of the potential witness Franklin on the eve of trial, and the recent attempts to influence jurors in other large narcotics cases (Pet. App. 12a-13a n.3, 17a, 18a n.7, 26a).[6] The court of appeals further concluded that the extensive information elicited from prospective jurors concerning their backgrounds and qualifications was sufficient to enable the parties to exercise their peremptory challenges intelligently (Pet. App. 19a-26a, 27a, 28a-31a).

In dissent, Judge Meskill acknowledged that the refusal to reveal the prospective jurors' names and addresses did not, standing alone, require reversal, and he noted that petitioners did not argue otherwise (Pet. App. 96a). Since the identities and addresses

[6] The court pointed out that sequestration would not have provided adequate protection against the possibility of threats or retaliation. "[S]ince communication with their families during sequestration would have been permitted, a mere threat to the family of one juror would have permeated the entire jury," and following the trial, all of the jurors would be vulnerable to possible retaliation (Pet. App. 27a).

of the jurors were withheld, however, Judge Meskill concluded that the district court's refusal to inquire into the jurors' ethnic and religious backgrounds "unnecessarily restricted" (Pet. App. 100a) the defendants' exercise of their right of peremptory challenge.

ARGUMENT

1. Petitioners contend (Supp. Pet. 3-7) that the district court, in imposing sentence, improperly considered their failure to cooperate with the authorities. We believe that this contention was properly rejected by the court of appeals (Pet. App. 53a-55a) for the reasons stated by the court and in our brief in opposition in *Roberts* v. *United States*, cert. granted, No. 78-1793 (Oct. 1, 1979).[7] As we noted there, a convicted defendant's refusal to assist the authorities may be considered in sentencing because it reflects his attitude toward his offense and toward society's effort to remedy the serious problems that his crime creates. See generally *United States* v. *Grayson*, 438 U.S. 41, 53 (1978). Nonetheless, because this issue is similar to that presented in *Roberts*, the Court may wish to defer disposition of this case pending a decision in *Roberts*.[8] The other issues presented by petitioners, however, are without merit and do not warrant this Court's review.

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[7] We are sending petitioners' counsel a copy of our brief in *Roberts*.

[8] If the *Roberts* case is affirmed, the petition should be denied in all respects. If *Roberts* is reversed, the present case can be remanded to the court of appeals for further consideration in light of *Roberts*.

2. Petitioners contend (Pet. 6, 9-17) that the district court's decision to withhold the names and addresses of prospective jurors, coupled with the court's refusal to inquire into the jurors' ethnic and religious backgrounds, violated petitioners' Sixth Amendment right to an impartial jury by depriving them of information they could have used in exercising their peremptory challenges. Petitioners concede (Pet. 11 n.*, 14) that inquiry into ethnic and religious backgrounds is not ordinarily required. Their contention (Pet. 14) is that the district court's refusal to inquire "either into jurors' names and addresses *or* their ethnic backgrounds * * * effectively emasculated [petitioners'] ability to intelligently exercise their peremptory challenges."

While there would ordinarily be little reason to restrict voir dire inquiry of the kind petitioners sought to make in this case, when reason exists to be concerned about the safety and welfare of the jurors or the integrity of their deliberations, the trial court enjoys discretion to accommodate the conflicting interests of defendants and jurors. Here, the court of appeals correctly held that, under the facts of this unusual case, the potential dangers posed by disclosure of the jurors' names, addresses, and certain background particulars outweighed any legitimate benefit to petitioners. Although peremptory challenges may be exercised for any or no reason, "that can hardly mean that every question suggested by counsel must be put by the trial judge because it might conceivably lead to a peremptory challenge." *United States*

v. *Gibbons*, 602 F.2d 1044, 1051 (2d Cir. 1979), petitions for cert. pending, Nos. 79-283 and 79-5256. By its examination of the issue of prejudice, the trial court assured petitioners a fair trial. And by its elicitation of extensive background information, the court assured that petitioners had a meaningful opportunity to exercise peremptory challenges. Moreover, since the prosecution as well as the defense was denied access to this information, there is no question of the former gaining any unfair advantages in the exercise of peremptory challenges.

a. Petitioners assert (Pet. 10) that the court of appeals has given the district courts virtually unlimited discretion to withhold juror identities from the parties in criminal trials. However, the court's ruling is expressly limited to the particular facts of this case, in which pretrial publicity was intense and "allegations of dangerous and unscrupulous conduct abounded" (Pet. App. 27a).[9]

In the circumstances presented here, the district court was fully justified in the precautions it took.

[9] Several petitions for writs of certiorari have recently been filed in which a district court's refusal to permit inquiries into prospective jurors' addresses and neighborhoods or places of business is asserted as error. See *Gibbons* v. *United States*, No. 79-283; *Perry* v. *United States*, No. 79-5256; *Thompson* v. *United States*, No. 79-5337. But as petitioners conceded below (Pet. App. 18a-19a), the failure to disclose juror addresses does not in itself require reversal. Petitioners' argument here relies instead on the "cumulative effect" of the district court's rulings, which assertedly prevented the defense from learning the jurors' religious and ethnic backgrounds.

The court was aware of the fact that this case involved a massive narcotics conspiracy in which several members were accused of using weapons; that one of the government's chief witnesses had been the target of a death threat; and that several of the conspirators had attempted to kill one of the members of the conspiracy. The court was thus on notice that there was a substantial risk that disclosure of the jurors' names and addresses to the defendants or their associates could lead to attempts to influence the jurors by means of intimidation or bribery.[10] Indeed, the trial court was familiar with specific recent instances of attempts to influence jurors in other similar trials of large narcotics conspiracies in the same district (Pet. App. 12a-13a n.3). Faced with this situation, the district court properly took reasonable steps to try to insure that the jury would be insulated from outside pressures and distractions.

Petitioners rely (Pet. 14-15) by analogy upon *Smith* v. *Illinois*, 390 U.S. 129 (1968), where the Court held that it was constitutional error for the

[10] Moreover, given the extensive pretrial publicity surrounding this case, it was likely that if the jurors' names had been publicly disclosed, members of the press would have contacted relatives of the jurors during the trial. These contacts could have jeopardized the trial process itself, for while the jurors were sequestered, they were not kept from contacting their families. Moreover, if family members had been subjected to media inquiries, a substantial danger existed that they would have discussed these contacts with the jurors. The record reflects that during the trial—despite the district court's precautions—at least one member of the press did contact the spouse of a juror (Tr. 9581, 9700-9701).

trial court to sustain objections to defense questions seeking to elicit the name and address of a prosecution witness. But, as Mr. Justice White noted in his concurring opinion in *Smith* (390 U.S. at 133-134), the Constitution does not guarantee the right to ask questions—even of a witness—that may endanger the witness' personal safety. It was precisely this type of concern that prompted the district court's action. See *United States* v. *Borelli*, 336 F.2d 376, 392 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); *Johnson* v. *United States*, 270 F.2d 721, 724 (9th Cir. 1959), cert. denied, 362 U.S. 937 (1960); *Wagner* v. *United States*, 264 F.2d 524, 527 (9th Cir.), cert. denied, 360 U.S. 936 (1959).[11] Moreover, the right to cross examine an adverse witness at trial is far more extensive than the right to examine prospective jurors, whose qualifications are explored in a limited

[11] There is direct statutory support for withholding juror names and addresses in appropriate cases. In enacting 28 U.S.C. 1863(b)(7) (redesignated by Pub.L. No. 95-572, Section 2(a), 92 Stat. 2453, formerly 28 U.S.C. 1863(b)(8)), Congress provided that each United States District Court's Jury Selection Plan should fix a time for the disclosure of names drawn from the jury wheel, but Congress also expressly provided that the plan may nevertheless permit the district judges "to keep these names confidential in any case where the interests of justice so require." The House and Senate reports both state that this provision was meant to preserve the practice in some districts of keeping "juror names confidential for fear of jury tampering." S. Rep. No. 891, 90th Cong., 1st Sess. 29 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess. 11 (1968). As Judge Meskill observed (Pet. App. 96a), the plan for the Southern District of New York provides that jurors' names may be kept confidential in the interests of justice.

hearing frequently conducted solely by the trial court. See Fed.R.Crim.P. 24(a); see also pages 16-17, *infra*.

Petitioners also argue (Pet. 17-23) that the district court should have explored less drastic alternatives rather than withholding the identities of the jurors. However, the district court did explore available alternatives and flexibly adopted procedures that accommodated the rights of the defendants and the jurors. The court increased the number of peremptory challenges available to the defense from 10 to 20 in order to assure that the defendants had an opportunity to select a suitable panel. Extensive background information was elicited, and the defense had the opportunity to observe the demeanor of all potential jurors and listen to their responses. The examination occupied four days of trial time, giving the defense sufficient opportunity to consider which jurors to challenge. Withholding information likely to facilitate identification of jurors was essential, however, in light of the extensive publicity surrounding the trial and the danger to jurors that would result if this information were disclosed.[12]

[12] Petitioners have failed to cite a single case in which this Court has applied a "less drastic alternative" principle in a similar context. Indeed, the Court rejected such an approach in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), where it was contended that before issuing a warrant to search for evidence of a crime at premises belonging to nonsuspects or newspapers, the magistrate must consider the use of other, less intrusive means. The Court's reluctance to impose such procedures in the context of a claim with strong First Amend-

b. Petitioners' argument (Pet. 10-17) that they were entitled to know the religious and ethnic backgrounds of the prospective jurors as an aid to their exercise of peremptory challenges misconceives both the nature of the peremptory challenge and the proper role of the voir dire in the jury selection process.

The Sixth Amendment guarantees a criminal defendant a trial by an "impartial jury." *Ristaino* v. *Ross*, 424 U.S. 589, 595 n.6 (1976). The peremptory challenge derives from the common law and is not constitutionally required. While its importance has been recognized (*Swain* v. *Alabama*, 380 U.S. 202, 219 (1965)), it is unlike the challenge for cause, which must be based on specified, legally cognizable grounds. It permits the rejection of a juror "for a real or imagined partiality that is less easily designated or demonstrable." *Id.* at 220. It is not subject to the court's control and may be exercised for any reason or for no reason, even arbitrarily or capriciously. *Ibid.*

Petitioners argue that because they were entitled to use their peremptory challenges to reject prospective jurors on the basis of the jurors' ethnic and religious backgrounds, they were necessarily entitled to receive specific information about ethnic and religious backgrounds through voir dire examination. But the right of peremptory challenge does not com-

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ment overtones fortifies the conclusion that such procedures are inappropriate for voir dire examination, the conduct of which is committed to the trial court's broad discretion. Fed. R. Crim. P. 24(a).

mand a right to the peremptory question. *United States* v. *Gibbons*, *supra*, 602 F.2d at 1051. If the law were otherwise, the district court's concededly broad discretion over the questioning of prospective jurors (Fed. R. Crim. P. 24(a); *Ristaino* v. *Ross*, *supra*, 424 U.S. at 594; *Hamling* v. *United States*, 418 U.S. 87, 139-140 (1974); *Ham* v. *South Carolina*, 409 U.S. 524, 527, 528 (1973); *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931)), would be subject to the whims of the defendant, who could insist on time-consuming inquiries concerning a host of arbitrary factors. The importance of vesting control in the district court over the scope of the voir dire is illustrated by the present case, in which the voir dire—even when conducted by the court—occupied four days, and over 150 questions were submitted by the parties for use in juror examination (Pet. App. 13a, 87a). A broader ranging voir dire would convert the proceeding into a trial of the jury, rather than a trial of the defendants.[13]

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[13] The courts have repeatedly recognized that ethnic and religious background is generally irrelevant to juror qualifications, and that a trial judge may therefore properly decline to inquire into such matters on voir dire. See, *e.g.*, *Gold* v. *United States*, 378 F.2d 588, 594 (9th Cir. 1967); *Yarborough* v. *United States*, 230 F.2d 56, 63 (4th Cir.), cert. denied, 351 U.S. 969 (1956) (religion is a "private matter"). Remote questions which pry unduly into the privacy of jurors are regularly denied in voir dire examinations. See, *e.g.*, *United States* v. *Taylor*, 562 F.2d 1345, 1355 (2d Cir.), cert. denied, 432 U.S. 909 (1977); *United States* v. *Hamling*, 481 F.2d 307, 314 (9th Cir. 1973), aff'd, 418 U.S. 87, 138-140 (1974).

It bears emphasis that in this case petitioners' desire for religious and ethnic information did not derive from a need adequately to explore any relevant bias or prejudice that the jurors may have had. Whether a particular juror was black or white or had a foreign accent could easily be discerned. Of greater importance, the possibility of racial prejudice on the part of jurors was exhaustively explored in the voir dire. Apart from this possible prejudice, there was no question of ethnicity or religion in the case. At no point in this case have petitioners attempted to show that persons of any particular ethnic group (or religion) would have been more or less favorably disposed toward their cause. In short, petitioners have totally failed to demonstrate how they could have been prejudiced by the failure to inquire into ethnic and religious background.

The purpose of the voir dire is not to cater to the defendant's whims but to protect the defendant's right to trial by an impartial jury. See, *e.g.*, *Ristaino* v. *Ross*, *supra*; *Aldridge* v. *United States*, *supra*, 283 U.S. at 311. That purpose was amply served in this case. The district court's questions were plainly "sufficient to test the qualifications and competency of the prospective jurors." *Hamling* v. *United States*, *supra*, 418 U.S. at 140. Indeed, as the court of appeals observed (Pet. App. 29a), the voir dire in this case was unusually extensive and provided petitioners with more than sufficient detailed information on which to form impressions about the jurors' biases or prejudices. Furthermore, the jury, as finally selected,

was in fact a fair and representative one, including five black jurors and one Hispanic alternate.[14] The fact that the jury's verdict was selected (acquitting two defendants entirely, acquitting petitioners Barnes and McCoy on some substantive counts, and failing to reach a verdict as to another defendant) confirms that the jury weighed the evidence as to each defendant and reached a fair and impartial result based on the concededly sufficient evidence of each defendant's guilt. See *United States* v. *Delval*, 600 F.2d 1098, 1103 (5th Cir. 1979); *United States* v. *Haldeman*, 559 F.2d 31, 60 n.28 (D.C. Cir. 1976) (*en banc*), cert. denied, 431 U.S. 933 (1977).

Under all the circumstances, the district court did not abuse its discretion in failing to elicit information about ethnic or religious backgrounds. See *Connors* v. *United States*, 158 U.S. 408, 414-415 (1895); *United States* v. *Peterson*, 483 F.2d 1222, 1228 (D.C. Cir.), cert. denied, 414 U.S. 1007 (1973); *Government of Virgin Islands* v. *Felix*, 569 F.2d 1274, 1276-1278 (3d Cir. 1978); *United States* v. *Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978).[15]

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[14] As one defense counsel stated at trial (Tr. 767-768): "We have a jury which is a polyglot jury. It's a cross section of the New York Metropolitan area. The jury is composed of women, the jury is composed of black people, the jury is composed of older men, older women, younger women, young men, * * * parents, daughters, sons, grandparents."

[15] Petitioners do not dispute that it is ordinarily permissible to withhold information about ethnic or religious background. As a general practice, the district courts in the Southern District of New York do not inquire into such matters during

3. Petitioners contend (Pet. 23-31) that the district court should have questioned a juror in midtrial concerning defense claims of bias arising from an incident in which one of a group of jurors allegedly made an insulting gesture toward counsel for a co-defendant, Guy Fisher (Tr. 5889-5892). Following the incident, Fisher's attorney requested that the juror be replaced with an alternate. The district court observed that the gesture, at most, represented the juror's temporary reaction (Tr. 5896, 5898) and declined to dismiss the juror. The court decided to give a cautionary instruction rather than conduct a hearing into the matter, noting that a hearing might itself engender resentment on the part of the jurors not only against Guy Fisher's attorney but against other defense counsel who were present at the time of the incident (Tr. 5896-5897). The court then admonished the jury that their personal feelings should not "be reflected for or against any of the defendants or government attorneys" (Pet. App. 33a).

Because the district court is in the position personally to observe the demeanor of the jury during the course of the trial, it has broad discretion in dealing with allegations of juror misconduct or prejudice. See *United States* v. *Bufalino*, 576 F.2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United*

voir dire. Of course, both the prosecution and the defense are subject to identical limitations when the trial court confines the scope of the voir dire. Neither side obtains an advantage by such a procedure.

States v. *Hendrix*, 549 F.2d 1225, 1227-1229 (9th Cir. 1977); *United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977). Here, the precautions taken by the district court, which were tailored to the particular circumstances presented (*United States* v. *Chaussee*, 536 F.2d 637, 641 (7th Cir. 1976)), were a prudent exercise of its discretion.[16] The court had good reason to fear that an inquiry could itself result in prejudice where none had previously existed. See *United States* v. *Delval*, *supra*, 600 F.2d at 1100-1101. There is no reason to speculate that the jury ignored the court's cautionary instruction, or that it failed to perform its duty to decide the case on the basis of the evidence.[17] No further allegations of juror misconduct or prejudice occurred during the trial, and the jury's verdict reflected an absence of bias: the jury failed to reach a verdict as to Guy Fisher, the very defendant whose attorney was the target of the gesture; the jury also acquitted two other defendants and acquitted peti-

[16] The cases relied on by petitioners (Pet. 28-29) are inapposite. In each of those cases, an inquiry was required because prejudicial newspaper articles raised a clear danger that the defendant would be convicted on the basis of extraneous facts that had not been adduced at trial.

[17] In protracted trials, jurors may feel sentiments of disapproval for particular lawyers based on their conduct of the case. Instructions from the court to disregard such sentiments and to render a verdict based on the evidence serve to remind the jury of its sworn duty. See *United States* v. *Panebianco*, *supra*, 543 F.2d at 457.

tioners Barnes and McCoy on several substantive counts.

4. At trial, the government introduced into evidence the federal income tax returns of petitioners Barnes, Hayden, and Hines, and co-defendants Guy Fisher and Wayne Sasso. The returns revealed that these defendants reported hundreds of thousands of dollars of "miscellaneous" income during the period of the conspiracy. As the court of appeals concluded (Pet. App. 38a-41a), this evidence was clearly probative of the defendants' guilt on the narcotics offenses. Petitioners do not challenge this conclusion. Rather, they contend (Pet. 31-45) that the district court should have held a hearing to determine whether the tax returns were obtained in violation of the disclosure provisions of the Tax Reform Act of 1976, 26 U.S.C. 6103(i)(1). Failure to comply with the provisions of the Act, petitioners assert, would have rendered the tax returns inadmissible against them at trial. However, the court of appeals correctly concluded (Pet. App. 35a-38a) that there is nothing in the Tax Reform Act that gives a criminal defendant the right to a hearing to seek suppression of tax returns.

Neither the language nor the legislative history of the Act suggests that Congress intended to provide an exclusionary sanction under the Act. Unlike the federal wiretap statute (18 U.S.C. 2518 (10)) and the federal rule governing search warrants (Fed. R. Crim. P. 41(f)), which explicitly provide for the exclusion of evidence, Section 6103(i)(4) states only

that before admitting into evidence a return obtained under subsection (i)(1), the court must find that the return "is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party." See S. Rep. No. 94-938, 94th Cong., 2d Sess. 329-330 (1976).

It is true, as petitioners assert (Pet. 37-41), that in enacting the Tax Reform Act, Congress was interested in protecting taxpayer privacy by changing the prior practice in which federal agencies were able to obtain returns "for nontax purposes almost at their sole discretion." S. Rep. No. 94-938, *supra*, at 328. But an interest in protecting privacy does not necessarily mean that Congress meant to create an exclusionary rule in federal criminal trials. As the court of appeals concluded (Pet. App. 38a), Congress was "apparently content to rely on a judge's competence to pass upon the facts submitted and the need for disclosure in a given case."[18] Because the Act expressly provides for civil and criminal penalties for violations of its disclosure provisions (26 U.S.C. 7213(a) and 7217), there is no need for the courts to imply an exclusionary sanction.

Moreover, such a sanction would be contrary to Congress' intent, as expressed in the statute. The last sentence of Section 6103(i)(4), governing admissibility of tax returns and tax return information, specifically states:

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[18] In this case, Judge Werker issued an *ex parte* order authorizing release of the tax returns prior to trial (Govt. Br. 74 n.*).

> The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding.

Under these circumstances, where no constitutional right is involved, where Congress has expressed the intent to deny an exclusionary remedy, and where privacy rights are protected by criminal and civil sanctions, there is no occasion to fashion additional exclusionary remedies. See generally *United States* v. *Caceres*, No. 76-1309 (Apr. 2, 1979).[19]

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[19] This conclusion is fortified by the statutory procedure for obtaining tax returns. The government cannot obtain such returns without establishing to the satisfaction of the district court authorizing release that the evidence is probative and cannot be obtained from other sources. See 26 U.S.C. 6103 (i) (1) (B). Prior judicial supervision effectively prevents unwarranted invasions of privacy.

CONCLUSION

Insofar as it relates to the propriety of petitioners' sentences, the petition for a writ of certiorari should be held pending the Court's disposition in *Roberts* v. *United States*, *supra*. In all other respects, the petition should be denied.

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